No. 2287

4

United States

Circuit Court of Appeals

For the Ninth Circuit.

MARY A. MEESE, MAY MEESE, EDITH MEESE, ANNA MEESE, ALFRED MEESE, a Minor, CATHERINE MEESE, a Minor, LIZZIE MEESE, a Minor, WILLIE MEESE, a Minor, BENNIE MEESE, a Minor, by Their Guardian ad Litem, MARY A. MEESE,

Plaintiffs in Error,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

FILMER BROS. CO. PRINT 330 JACKSON ST., S. F., CAL.

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INDEX OF PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

[Caption.]

Names and Addresses of Counsel.

GOVNOR TEATS, Esq., Attorney for Plaintiffs in Error,
510 Bernice Building, Tacoma, Washington.

LEO TEATS, Esq., Attorney for Plaintiffs in Error,
510 Bernice Building, Tacoma, Washington.

RALPH TEATS, Esq., Attorney for Plaintiffs in Error,
510 Bernice Building, Tacoma, Washington.

C. H. WINDERS, Esq., Attorney for Defendant in Error,
Lowman Building, Seattle, Washington.

[1*]

[Complaint.]

In the District Court of the United States for the Western District of Washington, Northern Division.

MARY A. MEESE, MAY MEESE, EDITH MEESE, ANNA MEESE, ALFRED MEESE, a Minor, CATHERIN MEESE, a Minor, LIZZIE MEESE, a Minor, WILLIE MEESE, a Minor, BENNIE MEESE, a Minor, by Their Guardian ad Litem, MARY A. MEESE,
Plaintiffs,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,
Defendant.

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*Page-number appearing at foot of page of original certified Record.

Plaintiffs herein complaining of the defendant company say:

I.

That on the 12th day of April, 1913, Benjamin Meese, deceased, received injuries through the carelessness and negligence of the defendant company and from said injuries the said Benjamin Meese died on the morning of the 17th day of April, 1913, in the city of Seattle, King County, Washington.

That the deceased, Benjamin Meese, left surviving him, his wife, plaintiff herein, Mary A. Meese; and also eight (8) children, also plaintiffs herein, to wit:

May Meese, of the age of twenty-two (22) years,
Edith Meese of the age of twenty (20) years,
Annie Meese of the age of eighteen (18) years,
Alfred Meese of the age of sixteen (16) years,
Catherin Meese of the age of thirteen (13) years,
Lizzie Meese of the age of twelve (12) years,
Willie Meese of the age of nine (9) years,
Bennie Meese of the age of six (6) years.

That all of said plaintiffs are citizens of the State of Washington, [2] residing in Seattle, King County, Washington.

That on the 29th day of May, 1913, Mary A. Meese was appointed by this Honorable Court guardian ad litem of the above-named minor children for the purpose of commencing and prosecuting their action against the Northern Pacific Railway Company, defendant herein, jointly with the surviving wife and other surviving children of Benjamin Meese.

That the Northern Pacific Railway Company is at this time, and was at all the times herein mentioned,

a corporation organized and existing under the laws of Wisconsin, owning and operating a railway system carrying freight for hire in the State of Washington and at the times and places hereinafter mentioned.

II.

On the 12th day of April, 1913, and for a long time prior thereto, Benjamin Meese, deceased, was in the employ of the Seattle Brewing & Malting Company, in its plant located at Georgetown in the city limits of the city of Seattle, King County, Washington; and as part of his duty under his employment with the said Brewing Company was to assist in loading beer upon the cars and also to place Government stamps upon the barrels half barrels, quarter barrels when filled with beer and before the same were loaded into the railroad cars spotted at the proper place at said Brewing plant for said loading. That at the plant, the said defendant had a railroad track running alongside of the wire house and buildings containing the finished products to be shipped by said Brewing Company, which said siding was connected with defendant company's switches, siding and main tracks; and the said defendant company furnished the said Brewing Company with cars on said track to be loaded with products of said plant to be [3] carried by said defendant company to their different points of destination. That after the said cars are placed upon said siding of said defendant company, the cars were spotted and moved by the Brewing Company to different places necessary for the loading on said siding, with appli-

ances furnished and operated by the said Brewing Company; and when the said cars were so placed upon the said siding and spotted at the proper places for loading the cars, said Brewing Company used skids and other appliances extending from the car into the wire house of the Brewing Company, for the purpose of rolling the kegs, barrels, quarter barrels or half barrels of the finished product of the Brewing Company from the plant into the car; and the said Brewing Company employed a crew of men called loaders for the purpose of loading said car with their said finished product and also with ice sometimes necessary in the shipment of the said finished product, and at the same time of loading the said car the said Brewing Company employed workmen to place the necessary Government stamps upon each of the receptacles of the said finished product, which was usually done while said receptacles were moving along the said skids; and the workmen who performed said work usually stood upon the floor or platform beneath the skids and which platform ran alongside of the building and plant of the Brewing Company and into the opening in the building or plant where the finished product was taken from the storehouse or plant. That while loading and filling the said car, the movement of the said car, especially without notice to the loading crew and the employee who placed the Government stamps upon the receptacles, was dangerous to the workmen of the Brewing Company, as the movement of the said car would cause the skids and receptacles of the finished product [4] to fall upon the employees of the

Brewing plant and injure them.

III.

That at the time of the accident herein complained of, the deceased husband and father was placing Government stamps upon the receptacles, half barrels of the finished products of the Brewing Company, in his regular course of employment with the Brewing Company, and located to the south of the skids and half barrels as they moved from the plant of the Brewing Company into the car.

IV.

That while the said deceased, Benjamin Meese, was so employed placing the Government stamps upon the half barrels and filling and loading a car upon said siding, on the 12th day of April, 1913, at about the hour of 6:10 o'clock of the evening of said day, the said defendant company, by and through its switchman, locomotive engineer and employees carelessly and negligently without warning to the deceased, Benjamin Meese, and without warning to any of the loading crew, then in the employ of the said Brewing Company loading the car upon the said siding, knowing that said men were at that time loading the car, caused a number of cars to come down the said siding alongside of the plant of the said Brewing Company with tremendous force and momentum, striking the car then being loaded with tremendous force and momentum, knocking the car along the track causing the skid then being used by loading crew to load the said car to fly backwards and against the deceased, causing large number of half barrels loaded with the finished product of the

Brewing Company upon the said skids to fall upon the deceased, maiming and injuring him so that from said injuries so received through the carelessness and negligence of the defendant company the said Benjamin Meese, deceased, [5] died on the morning of the 17th day of April, 1913, leaving his widow and children, parties plaintiff herein.

V.

That immediately after the accident and injury to Benjamin Meese, deceased, plaintiffs herein employed a surgeon and doctor for the purpose of treating and caring for the deceased, and that the said doctor and surgeon attended the deceased during the several days he lived, performed operations, and that the service so rendered are of the reasonable value of Two Hundred and Fifty ($250.00) Dollars. That the plaintiffs herein removed the deceased during his illness to the hospital and incurred a liability there of Forty and 53/100 ($40.53) Dollars. That the burial of the deceased caused the plaintiffs herein the sum of about Four Hundred and Twenty-five ($425.00) Dollars.

VI.

That at the time of the accident herein complained of the deceased Benjamin Meese, was fifty-two (52) years of age, an able-bodied, strong and healthy person, earning and able to earn about ninety ($90.00) dollars per month, living with and supporting his family, consisting of himself and the parties plaintiff herein. That he was a loved and loving husband and father, devoting his services, attention and care upon his family, educating his minor children, rear-

ing them in culture and giving them intellectual, moral and physical training as becomes a father. That the plaintiffs herein are damaged through the wrongful death of their husband and father, through the negligence and carelessness of the defendant company in the sum of Twenty-five Thousand Seven Hundred Fifteen and 53/100 ($25,715.53) Dollars.

Wherefore, plaintiffs pray judgment against the **[6]** defendant in the sum of Twenty-five Thousand Seven Hundred Fifteen and 53/100 ($25,715.53) Dollars, together with their costs and disbursements herein.

TEATS, TEATS & TEATS,
Attorneys for Plaintiff. **[7]**

[Verification.] **[8]**

[Caption.]

Demurrer.

Comes now the defendant Northern Pacific Railway Company, a corporation, and entering its appearance herein, demurs to the complaint of the plaintiffs, and for grounds of demurrer states:

I.

That the plaintiffs' complaint fails to state facts sufficient to constitute a cause of action against the defendant for the reason:

a. That there is no sufficient statement of facts set forth in said complaint to show that the accident referred to therein was the result of negligence or want of care on the part of the defendant.

b. That there is no authority in law under which the plaintiffs' action can be maintained as against

this answering defendant, it appearing from the complaint that Benjamin Meese, on account of whose wrongful death this action was brought, sustained the injuries of which complaint is made, at the place of work and plant of his employer, and that plaintiffs' claim comes within the terms of Chapter 74 of the Session Laws of the State of Washington for 1911, being an act relating to [9] compensation of injured workmen.

II.

That the Court has no jurisdiction of the subject matter of this action, the injuries to the plaintiffs' decedent having occurred while he was employed at the works and plant of his employer, and all rights of action by reason of the matters set forth in the plaintiffs' complaint have been withdrawn from the jurisdiction of the Court by Chapter 74 of the Session Laws of Washington for 1911 known as the Workmen's Compensation Act.

III.

That there is a defect of parties plaintiff.

C. H. WINDERS,
Attorney for Defendant.

[Verification.] [10]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2489.

MARY A. MEESE et al.,

Plaintiffs,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Defendant.

Order Sustaining Demurrer and Judgment of Dismissal.

BE IT REMEMBERED that this cause came on duly and regularly for hearing before the Court on the 7th day of July, 1913, upon the demurrer of the defendant to the plaintiffs' complaint, plaintiffs appearing by their attorneys Messrs. Teats, Teats & Teats and the defendant by its attorney, C. H. Winders, and the matter being duly and regularly submitted to the Court by both parties and the Court having taken the cause under advisement and having thereafter filed herein his written opinion sustaining said demurrer, which said opinion was filed on July 10, 1913, and the defendant now moving for an order sustaining said demurrer it is by the Court ordered, adjudged and decreed that the defendant's demurrer to the plaintiffs' complaint be and the same is hereby sustained.

And the plaintiffs in open court, through their attorney, electing to stand upon their complaint with-

out amendment, it is now upon motion of the defendant ordered, adjudged and decreed that the plaintiffs take nothing by their alleged cause of action herein, and that this action be and the same is hereby dismissed, and that the defendant [11] do have and recover of and from the plaintiffs its costs and disbursements herein to be taxed, to all of which the plaintiffs except and an exception is allowed.

Done in open court this 11th day of July, 1913.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Judgment of Dismissal. Filed in the U. S. District Court, Western Dist. of Washington, July 14, 1913, Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [12]

[Caption.]

Assignment of Errors.

In the United States Circuit Court of Appeals for the Ninth Circuit:

Now comes the above plaintiffs in error by their attorneys Teats, Teats and Teats, and say that in the record and proceedings in the Court below in the above-entitled action therein, there is substantial error in this: First, that the Court erred in sustaining the demurrer of the defendant therein to the complaint of the plaintiffs therein, for the reason that said complaint states a complete cause of action against the defendant therein. Second, that the Court erred in rendering judgment therein in dismissing the plaintiffs' action therein, for the reason

that the said judgment was contrary to law.

TEATS, TEATS & TEATS,
Attorneys for Plaintiffs in Error.

[Acceptance of Service, etc.] **[13]**

[Caption.]

Petition for Writ of Error.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Now comes Mary A. Meese, May Meese, Edith Meese, Anna Meese, Alfred Meese, a minor, Catherine Meese, a minor, Lizzie Meese, a minor, Willie Meese, a minor, Bennie Meese, a minor, by their guardian ad litem, Mary A. Meese, plaintiffs in error, and petitions this Honorable Court to allow a Writ of Error to be directed to the District Court of the United States for the District of Washington, Northern Division, to remove to this, the United States Circuit Court of Appeals for the Ninth Circuit for a review thereof, the record in the case lately pending in said court below, wherein above-named plaintiffs in error were plaintiffs and the above-named defendant in error was defendant, and particularly the record of the judgment rendered by said District Court in the said cause wherein the said Court below sustained the demurrer of the defendant to the complaint of the plaintiffs and dismissed the said plaintiffs said cause at their costs; said judgment was duly entered on record therein on the 11th day of July, 1913; that plaintiffs be allowed to perfect **[14]** this appeal on filing an appeal bond in the sum of two hundred dollars.

Your petitioners respectfully state that they have this day filed herewith their assignment of errors committed by the Court below in said cause, and intended to be urged by your petitioners and plaintiffs in error in the prosecution of this their suit in error.

Dated July 11, 1913.

TEATS, TEATS & TEATS,
Attorneys for Plaintiffs in Error.

[Acknowledgment of Service, etc.] **[15]**

[Caption.]

Order Allowing Writ of Error.

Upon a petition of the plaintiffs herein, they having filed their assignments of error, it is ordered that a writ of error be, and is hereby allowed, to have reviewed in the United States Circuit Court of Appeals Ninth Circuit, the judgment heretofore entered herein, upon the plaintiffs in error filing their cost bond in the sum of Two Hundred Dollars.

EDWARD E. CUSHMAN,
United States District Judge.

[Endorsed: Filed, etc.] **[16]**

[Caption.]

Appeal Bond.

KNOW ALL MEN BY THESE PRESENTS, That we, Mary A. Meese, May Meese, Edith Meese, Anna Meese, Alfred Meese, a minor, Catherine Meese, a minor, Lizzie Meese, a minor, Willie Meese, a minor, and Bennie Meese, a minor, by their Guardian ad litem, Mary A. Meese, as principals, and Fidelity and Deposit Company of Maryland, as Surety,

are held and firmly bound unto the Northern Pacific Railway Company, a corporation, defendant, above named, in the sum of Two Hundred ($200.00) Dollars, to be paid to the said Northern Pacific Railway Company or its assigns, which payment well and truly to be made, we bind ourselves and each of us jointly and severally, and our and each of our successors, representatives, assigns, executors and administrators, firmly by these presents.

Sealed with our seals and dated this 15th day of July, 1913.

Whereas, the above-named plaintiffs have sued out a Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment in the above-entitled cause in the District Court of the United States for the Western [17] District of Washington, Northern Division, and

Now, therefore, the condition of this obligation is such, that if the above-named plaintiffs, Mary A. Meese, May Meese, Edith Meese, Anna Meese, Alfred Meese, a minor, Catherine Meese, a minor, Lizzie Meese, a minor, Willie Meese, a minor, Bennie Meese, a minor, by their guardian ad litem, Mary A. Meese, shall prosecute said Writ to effect and answer for all costs if it shall fail to make good its plea, then

this obligation shall be void; otherwise to remain in full force and effect.

MARY A. MEESE,
MAY MEESE,
EDITH MEESE and
ANNA MEESE,
ALFRED MEESE, a Minor,
CATHERINE MEESE, a Minor,
LIZZIE MEESE, a Minor,
WILLIE MEESE, a Minor,
BENNIE MEESE, a Minor,
By their Guardian ad Litem,
MARY A. MEESE.
By their Attorneys of Record.
TEATS, TEATS and TEATS,
Principals.

FIDELITY & DEPOSIT COMPANY, of Maryland.
By H. T. HANSEN,
Attorney in fact.

The above bond and sufficiency of the surety on the same are hereby approved this 16th day of July, 1913.

EDWARD E. CUSHMAN,
Presiding District Judge.

[Endorsed: Filed, etc.] **[18]**

[Opinion.]

[Caption.]

CUSHMAN, District Judge.

This suit was brought to recover for the death of the husband and father of the plaintiffs, alleged to

have been caused by the wrongful act of the defendant. Defendant demurs to the complaint upon several grounds, the only one argued being,

> "That there is no authority in law under which the plaintiffs' action can be maintained as against this answering defendant, it appearing from the complaint that Benjamin Meese, on account of whose wrongful death this action was brought, sustained the injuries of which complaint is made, at the place of work and plant of his employer, and that plaintiffs' claim comes within the terms of Chapter 74 of the Session Laws of the State of Washington for 1911, being an act relating to compensation of injured workmen."

The complaint alleges:

> "On the 12th day of April, 1913, and for a long time prior thereto, Benjamin Meese, deceased, was in the employ of the Seattle Brewing & Malting Company, in its plant located at Georgetown in the city limits of the City of Seattle, King County, Washington; and as part of his duty under his employment with the said Brewing Company, was to assist in loading beer upon the cars and also to place Government stamps upon the barrels, half barrels, quarter barrels when filled with beer and before the same were loaded into the railroad cars spotted at the proper place at said Brewing plant for said loading. **[19]** That at the plant, the said defendant had a railroad track running alongside of the wire house and buildings containing the

finished products to be shipped by said Brewing Company, which said siding was connected with defendant Company's switches, siding and main tracks; and the said defendant Company furnished the said Brewing Company with cars on said track to be loaded with products of said plant to be carried by said defendant Company to their different points of destination. That after the said cars are placed upon said siding of said defendant Company, the cars were spotted and moved by the Brewing Company to different places necessary for the loading on said siding, with appliances furnished and operated by the said Brewing Company; and when the said cars were so placed upon the said siding and spotted at the proper places for loading the cars, said Brewing Company used skids and other appliances extending from the car into the wire house of the Brewing Company, for the purpose of rolling the kegs, barrels, quarter barrels or half barrels of the finished product of the Brewing Company from the plant into the car; and the said Brewing Company employed a crew of men called loaders for the purpose of loading said car with their said finished product and also with ice sometimes necessary in the shipment of the said finished product and at the same time of loading the said car, the said Brewing Company employed workmen to place the necessary Government stamps upon each of the receptacles of the said finished product, which was usually done while said receptacles were

moving along the said skids; and the workmen who performed said work usually stood upon the floor or platform beneath the skids and which platform ran alongside of the building and plant of the Brewing Company and into the opening in the building or plant where the finished product was taken from the storehouse or plant. That while loading and filling the said car, the movement of the said car, especially without notice to the loading crew and the employee who placed the Government stamps upon the receptacles, was dangerous to the workmen of the Brewing Company, as the movement of the said car would cause the skids and receptacles of the finished product to fall upon the employees of the Brewing plant and injure them.

"That at the time of the accident herein complained of, the deceased husband and father, was placing Government stamps upon the receptacles, half barrels of the finished products of the Brewing Company, in his regular course of employment, with the Brewing Company and located to the south of the skids and half barrels as they moved from the plant of the Brewing Company into the car.

"That while the said deceased, Benjamin Meese, was so employed, placing Government stamps upon the half barrels and filling and loading a car upon said siding, on the 12th day of April, 1913, at about the hour of 6:10 o'clock of the evening of said day, the said defendant

Company by and through its switch-man, locomotive engineer and employees, carelessly and negligently without warning to the deceased, Benjamin Meese, and without warning to any of the loading crew, then in the employ of the said Brewing Company, loading the car upon the said siding, knowing that said men were at that time loading the car, caused a number of cars to come down the said siding alongside of the plant of the said Brewing Company with tremendous force and momentum, striking the car then being loaded, with tremendous force and momentum, knocking the car along the track, causing the skid then being used by loading crew to load the said car to fly backwards and against the deceased, causing large number of half barrels loaded with the finished product of the Brewing Company upon the said skids to fall upon the deceased maiming and injuring him so that from said injuries so received through the carelessness and negligence of the defendant Company, the said Benjamin Meese, **[20]** deceased, died on the morning of the 17th day of April, 1913, leaving his widow and children, parties plaintiff herein."

TEATS, TEATS & TEATS, for Plaintiffs.
C. H. WINDERS, for Defendant.

The Workmen's Compensation Law (Washington Session Laws 1911, p. 345), provides:

"* * * * The State of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises

are withdrawn from private controversy, and sure and certain relief for workmen, injured in extrahazardous work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this act; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this act provided. (Sec. 1, pp. 345 and 346.) * * *

"Workman means every person in this state, who, after September 30, 1911, is engaged in the employment of an employer carrying on or conducting any of the industries scheduled or classified in section 4, whether by way of manual labor or otherwise, and whether upon the premises or at the plant, or, he being in the course of his employment, away from the plant of his employer: 'PROVIDED, HOWEVER, That if the injury to a workman occurring away from the plant of his employer is due to the negligence or wrong of another not in the same employ, the injured workman, or if death result from the injury, his widow, children, or dependents, as the case may be, shall elect whether to take under this act or seek a remedy against such other, such election to be in advance of any suit under this section; and if he take under this act, the cause of action against such other shall be assigned to the state for the benefit of

the accident fund; if the other choice is made, the accident fund shall contribute only the deficiency, if any, between the amount of recovery against such third person actually collected, and the compensation provided or estimated by this act for such case. Any such cause of action assigned to the state may be prosecuted, or compromised by the department, in its discretion. Any compromise by the workman of any such suit, which would leave a deficiency to be made good out of the accident fund, may be made only with the written approval of the department. (Sec. 3, pp. 347 and 348.) * * *

"Each workman who shall be injured whether upon the premises or at the plant or, he being in the course of his employment, away from the plant of his employer, or his family or dependents in case of death of the workman, shall receive out of the accident fund compensation in accordance with the following schedule, and, except as in this act otherwise provided, such payment shall be in lieu of any and all rights of action whatsoever against any person whomsoever." (Sec. 5, p. 356.)

No question is made but that the employment of the deceased was of an extrahazardous character and within those employments provided for in the act. The question presented [21] is purely one of statutory construction.

Upon the argument much was said concerning the constitutionality of a legislative act compelling contribution from one person, or employer, to be used in

paying for the negligence of another. This phase of the act is not now before the Court. That is a defense only to be made by those obliged to contribute to, or those charged with the duty of administering the funds contributed. The question of legislative power may, in this case, only be considered as, possibly, one of the guides to be resorted to in determining the legislative intent manifested by the law as written.

There is no right of action at common law to recover for death occasioned by the wrongful act of another.

13 Cyc. 310.

It is a right solely given by statute. A right such as this which the legislature gives, it may, of course, take away. The sole question, therefore, is: What was the legislative intent concerning this matter? Was it to end all suits at law for the injury or death of employees while engaged in certain occupations, no matter by whom injured or killed? Or, was it only to end such controversies between employer and employee?

Parts of the act, taken alone, would justify either conclusion. The title provides:

> "An Act relating to the compensation of injured workmen in our industries."

This shows a broad purpose—broad enough to include all injuries caused by any one to such "workman in our industries."

Section 1 announces:

> "The common law system governing the remedy of workmen against employers for injuries

received in hazardous work is inconsistent with modern industrial conditions."

This shows a narrower view; but, as shown by the parts of the act quoted above, it does not stand alone. Section III of the act, above quoted, provides that, when the deceased workman is [22] killed "away from the plant of his employer," through the negligence of another "not in the same employ," his wife or children may elect whether to take, under the act, the industrial insurance therein provided for, or seek to recover from such other—that is, recover in an ordinary law action for such other's negligence.

In this case, the complaint shows that the deceased was—giving the ordinary meaning to the words—killed, not "away from," but at the plant of his employer. Sections III and V, in classifying the injuries by the place where they occur, both contain the expression, "whether upon the premises or at the plant or, he being in the course of his employment, away from the plant of his employer." "At the plant" may include less or more than "on the premises," depending on the relative extent of the two; but these two expressions show an intention not to limit the application of the law to real property boundaries.

The proviso, expressly preserving the right of action at law for the death of an employee, resulting from an injury "occurring away from the plant of the employer" clearly shows an intent to except from that provision of the act, abolishing all private controversies and all rights of civil action, what, but for such provision, would have been abolished, and,

as the right of civil action is alone preserved when the injury occurs "away from the plant of the employer," then it is not preserved, but is abolished when it occurs at the plant of the employer.

This intent is further manifested by Section V of the act providing for the payment of industrial insurance from the fund created by the act, which "shall be in lieu of any and all rights of action whatsoever against any person whomsoever," "Except as in this act otherwise provided."

The only relevant exception is, without doubt, the one referred to in the provision of the act providing:

> "That if the injury to a workman occurring away from the plant of his employer is due to the negligence or wrong of another **[23]** not in the same employ, the injured workman, or if death result from the injury, his widow, children or dependents, as the case may be, shall elect whether to take under this act or seek a remedy against such other, such election to be in advance of any suit under this section; and if he take under this act, the cause of action against such other shall be assigned to the state for the benefit of the accident fund; if the other choice is made, the accident fund shall contribute only the deficiency, if any, between the amount of recovery against such third person actually collected, and the compensation provided or estimated by this act for such case." (p. 348.)

Courts have often had occasion to point out that the intent may frequently more satisfactorily be

shown by the nature of an exception than in any other way. This seems to be such a case.

Demurrer sustained.

Filed July 10, 1913. [24]

Writ of Error [Copy].

UNITED STATES OF AMERICA.

The President of the United States of America to the Honorable, the Judge of the District Court of the United States for the Western District of Washington, Northern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of dismissal which is in the said District Court before you, or some of you between Mary A. Meese, May Meese, Edith Meese, Anna Meese, Alfred Meese, a minor, Catherine Meese, a minor, Lizzie Meese, a minor, Willie Meese, a minor, Bennie Meese, a minor, by their guardian ad litem, Mary A. Meese, plaintiffs in error, and Northern Pacific Railway Company, a corporation, defendant in error, a manifest error hath happened to the damage of the said plaintiffs in error, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this Writ, so that you have

the same at San Francisco, in said Circuit, on the 13th day of August, 1913; and that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, which of right and according to law and custom of the United States ought to be done.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 14th day of July, 1913.

[Seal] FRANK L. CROSBY,

Clerk of the District Court of the United States District Court, for the Western District of Washington. **[25]**

Allowed by

[Seal] EDWARD E. CUSHMAN,

District Judge of the United States, Presiding in the District Court of the United States, for the Western District of Washington, Northern Division.

[Admission of Service, etc.]

Filed July 16, 1913. **[26]**

[Caption.]

Citation [Copy].

UNITED STATES OF AMERICA.

The President of the United States of America to Northern Pacific Railway Company, a Corporation, Greeting:

You are cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at the courtroom of said Court, in the city of San Francisco, in the State of California,

within thirty (30) days after the date of this Citation, pursuant to Writ of Error filed in the Clerk's office of the District Court of the United States, for the Western District of Washington, Northern Division, wherein Mary A. Meese, May Meese, Edith Meese, Anna Meese, Alfred Meese, a minor, Catherine Meese, a minor, Lizzie Meese, a minor, Willie Meese, a minor, Bennie Meese, a minor, by their guardian ad litem, Mary A. Meese, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said Writ of Error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf. [27]

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, the 14th day of July, 1913.

[Seal] EDWARD E. CUSHMAN,
Judge of the District Court of the United States.

[Admission of Service, etc.]

Filed July 14, 1913. [28]

[Caption.]

Praecipe.

To the Clerk:

Please make and prepare the record for the Circuit Court of Appeals in the above-entitled action, to wit: Complaint, Demurrer, Order Sustaining Demurrer and Judgment Dismissing Case, Assignment of Error, Petition for Writ of Error, Order Allowing Writ of Error, Appeal Bond, Opinion of Court.

TEATS, TEATS and TEATS.

[Endorsedment of filing, etc.] [29]

[Caption.]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court, for the Western District of Washington, do hereby certify the foregoing 29 typewritten pages numbered from 1 to 29, inclusive, to be a true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as are necessary to the hearing of said cause on Writ of Error therein in the United States Circuit Court of Appeals for the Ninth Circuit, and as is stipulated for by counsel of record herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on return to said Writ of Error herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the foregoing to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the plaintiffs in error for the preparation and certification of the typewritten transcript of record issued to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's Fee (Sec. 828 R. S. U. S. as Amended by Sec. 6 Act of March 2, 1905) for making transcript of the record for printing purposes, 84 folios at 20c per folio.....	$16.80
Certificate to certified copy of type-written transcript of record.....	.30
Seal to said certificate.....	.40
	$17.50

I hereby certify that the above cost for preparing and certifying record amounting to $17.50 has been paid to me by Messrs. Teats, Teats & Teats, attorneys for plaintiffs in error.

I further certify that I hereto attach and herewith transmit the original Writ of Error and original Citation issued in this cause.

IN WITNESS WHEREOF I have hereto set my hand and affixed the seal of said District Court at Seattle, in said District, this 17th day of July, 1913.

[Seal] FRANK L. CROSBY,
Clerk.

Writ of Error [Original].

UNITED STATES OF AMERICA.

The President of the United States of America, to the Honorable, the Judge of the District Court of the United States for the Western District of Washington, Northern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of dismissal which is in the said District Court before you, or some of you

between Mary A. Meese, May Meese, Edith Meese, Anna Meese, Alfred Meese, a minor, Catherine Meese, a minor, Lizzie Meese, a minor, Willie Meese, a minor, Bennie Meese, a minor, by their guardian ad litem, Mary A. Meese, Plaintiffs in Error, and Northern Pacific Railway Company, a corporation, Defendant in Error, a manifest error hath happened to the damage of the said Plaintiffs in Error, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, together with this Writ, so that you have the same at San Francisco, in said Circuit, on the 13th day of August, 1913; and that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, which of right and according to law and custom of the United States ought to be done.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court

of the United States, this 14th day of July, 1913.

[Seal] FRANK L. CROSBY,

Clerk of the District Court of the United States District Court, for the Western District of Washington.

Allowed by

[Seal] EDWARD E. CUSHMAN,

District Judge of the United States, Presiding in the District Court of the United States, for the Western District of Washington, Northern Division.

[Admission of Service, etc.]

[Caption.]

Citation [Original].

UNITED STATES OF AMERICA.

The President of the United States of America to Northern Pacific Railway Company, a Corporation, Greeting:

You are cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at the courtroom of said court, in the city of San Francisco, in the State of California, within thirty (30) days after the date of this Citation, pursuant to Writ of Error filed in the Clerk's office of the District Court of the United States, for the Western District of Washington, Northern Division, wherein Mary A. Meese, May Meese, Edith Meese, Anna Meese, Alfred Meese, a minor, Catherine Meese, a minor, Lizzie Meese, a minor, Willie Meese, a minor, Bennie Meese, a minor, by their

guardian ad litem, Mary A. Meese, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said Writ of Error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, the 14th day of July, 1913.

[Seal] EDWARD E. CUSHMAN,
Judge of the District Court of the United States.

[Admission of Service, etc.]

[Stipulation Under Rule 23 as to Printing Record.]

[Title of Cause.]

In printing the record the Clerk shall eliminate all captions and verifications, excepting the caption of the complaint, and in lieu thereof print the words: "Caption" and "Verification"; also all file marks, admissions and proof of service.

TEATS, TEATS & TEATS,
Attorneys for Plaintiff in Error.

C. H. WINDERS,
Attorney for Defendant in Error.

[Endorsed]: No. 2287. In the United States Circuit Court of Appeals for the Ninth Circuit. Filed Jul. 21, 1913. F. D. Monckton, Clerk.

[Endorsed]: No. 2287. United States Circuit Court of Appeals for the Ninth Circuit. Mary A. Meese, May Meese, Edith Meese, Anna Meese, Alfred Meese, a Minor, Catherine Meese, a Minor, Lizzie Meese, a Minor, Willie Meese, a Minor, Bennie Meese, a Minor, by Their Guardian ad Litem, Mary A. Meese, Plaintiffs in Error, vs. Northern Pacific Railway Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filed July 21, 1913.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2287.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MARY A. MEESE, MAY MEESE, EDITH MEESE, ANNA MEESE, ALFRED MEESE, a minor; CATHERINE MEESE, a minor; LIZZIE MEESE, a minor; WILLIE MEESE, a minor; BENNIE MEESE, a minor, by their guardian *ad litem*, MARY A. MEESE,
Plaintiffs in Error,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a corporation,
Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

Brief of Plaintiffs in Error

STATEMENT.

On the 12th day of April, 1913, Benjamin Meese, deceased, was in the employ of the Seattle Brewing & Malting Company of Seattle, Washington, plac-

ing Government stamps on filled kegs as they were being loaded into cars of the defendant in error, the Northern Pacific Railway, which were spotted alongside of the brewery's storehouse on defendant's siding. The siding was part of defendant's railway system. The storehouse was part of the brewing plant of the deceased employe.

While at work on said date in his regular course of employment, placing stamps on the kegs as they were being loaded by the loading crew of the Brewery, the defendant's switch crew, knowing the deceased and the loading crew were at work in and about the car, without warning to them or the deceased, shunted some cars down the siding with great speed, striking the car being loaded with terrific force, throwing the kegs with great force against and upon the deceased, causing injuries from which he died five days later.

"That immediately after the accident and injury to Benjamin Meese, deceased, plaintiffs herein employed a surgeon and doctor for the purpose of treating and caring for the deceased, and that the said doctor and surgeon attended the deceased during the several days he lived, performed operations, and that the services so rendered are of the reasonable value of two hundred and fifty ($250.00 dollars. That the plaintiffs herein removed the deceased during his illness to the hospital and incurred a liability there of forty and 53/100

dollars. That the burial of the deceased caused the plaintiffs herein the sum of about four hundred and twenty-five ($425.00) dollars" (Rec., Sec. 5, p. 6).

The deceased left surviving him his widow and children, plaintiffs in error herein, who commenced this action against the railway company to recover expense incurred for the surgeon and doctor in the case of the deceased from the time of his injury until his death in the sum of $250.00, hospital services $40.53, burial expense $425.00 and also general damages, $25,000.00, in the total sum of $25,715.53.

The Railway Company demurred to the complaint on the ground that the Workmen's Compensation law of the State of Washington, (Ch. 74, laws 1911), has withdrawn all rights of action by reason of the matters set forth in the plaintiff's complaint from legal controversy and from the jurisdiction of the court.

The demurrer was sustained on that ground. Plaintiffs standing upon their complaint, judgment of dismissal was entered against the plaintiffs and they have sued out this writ of error.

ARGUMENT.

The writer of this brief wishes to state in the first place that we do not attack the constitutionality of the law as a whole, nor do we attack the decision of the Supreme Court of the State of Wash-

ington in upholding the law in the case of *State ex rel. Davis vs. Clausen,* 65 Wash. 156, but our position in this matter is,

First: The Workmen's Compensation Act of Washington does not and never was intended to abrogate the rights of workmen in our industries against third party wrong-doers. But that Act undertakes great reforms bearing on the relation of master and servant and does not undertake to eliminate the workmen's cause of action arising through negligence against third parties.

Second: That if the language of the Act is so comprehensive as to sustain the position of the lower court, that portion of the Act comes within the inhibition of the 14th Amendment to the Constitution and Section 12 of Article 1 of our State Constitution, giving plaintiffs equal protection of law.

Third: The liability of the defendant in error to the plaintiffs in error for surgeon's and doctor's bills, hospital services and funeral expenses, is a vested right under the common law, which the Legislature cannot take away, in such a case as the case at bar. The lower court rests its decision upon the construction of the Statute and says that it can be construed either for or against the plaintiffs. Let us take up the simple question of the construction of the Statute and, in order to do so, we must understand the conditions which brought forth the law.

For several years before the enactment of the Workmen's Compensation law, there was a great awakening of the public mind to the realization of the enormity of industrial accidents and the great injustice done to the injured and the wives and children of those killed while at work in the industries of the country. The court made law or rule of fellow servant, assumption of the risk and contributory negligence, placed the burden of 90 per cent of those accidents upon the injured or their survivors, which was also a burden on the people. Personal injury litigation and perhaps the conduct of many lawyers gave employers the nightmare, and they sought relief through casualty insurance companies which sold them a policy indemnifying them against loss. For a while that seemed a protection, but the merciless, heartless adjusters of casualty companies played upon the poverty of the injured workmen, took advantage of every condition and drove hard bargains in their settlement. This resulted in ill feelings between all the workmen and their employers. Their community interests were fast being divorced through these conditions. When an accident occurred, the employer was compelled to turn over to the casualty company his duty of adjustment, and this simple fact has caused the whole working force of the employer to quit their work and walk away, to the great loss of the employer as well as the employe. In cases where the injured workman received a judgment the employer was liable for the excess

over his policy and the casualty company was ever ready to contest its liability on the slimmest technicality. So universal was this that at the time of the passage of the Workmen's Compensation law employers of this State carrying a casualty policy had no assurance of safety. The workmen who must fight the casualty company and run the gauntlet of the technical points of law had no assurance of winning. There became a demand, almost universal, that this unscientific, strife-breeding condition between employer and employe should cease. All over the land students of economics, employes and employers, gathered together to discuss conditions of master and servant, reforms and the ways and means of reform. They recognized that accidents in our industries are inevitable; that each individual of the human race is subject to the fault of forgetfulness, and that the burden and loss to an individual workman through an accident is as much an expense and a charge upon the industry as the breaking of a machine or the killing of a mule. The industry must bear the burden which naturally belongs to it. This sentiment crystallized rapidly and found its expression in the compensation laws of the different states. During the last three years 23 states have passed workmen's compensation or accident insurance laws. The future promises more and better laws along these lines and also along the line of laws preventing accidents. Judge Fullerton recognized these facts when he said:

"That the statute here in question has the attribute of reasonableness, rather than that of capriciousness, seems incontrovertible. The evil it seeks to remedy is one that calls loudly for action. Accidents to workmen engaged in the industries enumerated in it are all but inevitable. It seems that no matter how carefully laws for the prevention of accident in such industries may be framed, or how rigidly they may be enforced, there is an element of human equation that enters itno the problem which cannot be eliminated and which invariably causes personal injuries and consequent financial losses to workmen engaged therein. Heretofore these losses have been borne by the injured workmen themselves, by their dependants, or by the state at large. IT WAS THE BELIEF OF THE LEGISLATURE THAT THEY SHOULD BE BORNE BY THE INDUSTRIES CAUSING THEM, or perhaps more accurately, by the consumers of the products of such industries. That the principle thus sought to be put into effect is economically, sociologically, and morally sound, we think must be conceded."

In July of 1910, a number of employers, workmen and students of sociologic and economic subjects gathered in Tacoma, discussed conditions and ways and means for relief. We invited the Governor of the State of Washington to preside to give it an official color. We had him appoint a commit-

tee of five employers and five employes for the purpose of investigating and drawing up some sort of a measure along the lines of the German Workmen's Compensation law. The writer of this brief constantly attended the meetings as a sort of amicus curiae. He went to the Legislature of 1911 for the major purpose of passing a compensation law along the lines agreed upon by the Commission.

The Commission termed itself the Employers Liability Commission to solve the question of industrial insurance, in no other phase except that relating to master and servant. The constitutional questions involved in that phase alone were sufficient to keep us all within those limits (See report of Commission). The first section of the Act is a declaration of the principles, statement of the purpose and scope of the Act:

> "THE COMMON LAW SYSTEM GOVERNING THE REMEDY OF WORKMEN AGAINST EMPLOYERS FOR INJURIES RECEIVED IN HAZARDOUS WORK IS INCONSISTENT WITH MODERN INDUSTRIAL CONDITIONS. In practice it proves to be economically unwise and unfair. Its administration has produced the result that little of the cost of the employer has reached the workman and that little only at large expense to the public. The remedy of the workman has been uncertain, slow and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable. The welfare of the

State depends upon its industries, and even more upon the welfare of its wage-worker. The State of Washington, therefore, exercising herein its police and sovereign power, declares that ALL PHASES OF THE PREMISES are withdrawn from private controversy, and sure and certain relief for workmen, injured in extra hazardous work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this Act; and to that end all civil actions and civil causes of action *for such personal injuries* and all jurisdiction of the courts of the State over such causes are hereby abolished, except as in this Act provided.

"The abolishing of jurisdiction of courts over personal injury claims applies only to those in the relation of employer and employe in "extra hazardous" occupations. Employes as members of the public have their rights against third persons as heretofore. Suits allowed against employer, see Sec. 8. Even though the injury or death be caused by the tort of a third person, the employe may obtain compensation by election and assignment, except where a wilful act of such other, committed against the employe, be for reasons personal and not because of his employment." Note of Commission at end of Sec. 1.

"All phases of the premises" has a legal meaning. It relates to the subject which has been mentioned, the remedy of the workman against his employer for injury received in hazardous work. It was the condition I have described existing between master and servant the law undertook to remedy—with one exception, perhaps, as is mentioned in Section 3, which provides,

> "That if the injury to a workman occurring away from the plant of his employer is due to the negligence or wrong of another not in the same employ, the injured workman, or if death result from the injury, his widow, children, or dependents, as the case may be, shall elect whether to take under this act or seek a remedy against such other, such election to be in advance of any suit under this section; and if he take under this act, the cause of action against such other shall be assigned to the State for the benefit of the accident fund; if the other choice is made, the accident fund shall contribute only the deficiency, if any, between the amount of recovery against such third person actually collected, and the compensation provided or estimated by this act for such case. Any such cause of action assigned to the State may be prosecuted, or compromise by the workman of any such suit, which would leave a deficiency to be made good out of the accident fund, may be made only with the written approval of the department."

With this exception the law does not pretend to change the rights of the workman or his heirs or representatives as against a third person. This section did not take away his right of action against the third person. It only gave him the privilege of accepting compensation from the State upon his assigning his right of action against the third person.

It seems to me that it is a farfetched construction of this clause to say that the Statute meant to take away all right of action against third persons simply because the workman was injured or killed while at the plant and in the course of duty. Why give to the employe who was injured away from the plant the option of pursuing the third person and take away from the employe who remains at the plant his right of action against the third party who injures him at the plant? To me it seems that this is so objectionable, having regard to the rights of the workman, that even if the Act specially provided for such, it would be objectionable on constitutional ground, and where the Act does not specially provide for an elimination of the workman's right of action who was injured at the plant by a third person, what would we say of a court that will interpolate by way of construction such a provision?

EQUAL PROTECTION OF THE LAWS:

This subject has been so thoroughly thrashed out in the Supreme Court of the United States that

possibly all that is necessary is a few citations. But our position is, as stated before, that the plaintiffs in this case by the rule of the court below are not given their protection, their rights, as guaranteed by the 14th Amendment. Equal protection, as we understand it, means equality to all similarly situated. That is, not discriminating against some and favoring others and which affects alike all persons similarly situated. *Barbier vs. Connolly*, 5 Supr. Crt. Rep. 357. That is to say, if the law applies to all persons who are injured under like or similar circumstances to the injury which occurred to the deceased husband and father, then the law is not within the inhibition of the constitutional provision. But if the law does not treat all persons alike, then it is within the inhibition. *Mo. Pac. vs. Mackey*, 8 Supr. Crt. Rep. 1161. But if the law treats or applies to a class which is distinct within itself and has characteristics belonging to itself, such as the setting out of fires by locomotives, injuries which occur in mines or certain extra hazardous industries can be treated specially by a law, either imposing other duties, or taking away different defenses, or changing the whole system of liability and compensation as is done in the Workmen's Compensation Act. But where the business of employers is not subject to peculiar dangers to the employes, dangers not characteristic to that particular industry, it is an unreasonable classification and not permitted. This is well put by the Supreme Court of Kansas:

> "The equal protection mentioned by enforcement of this Statute is denied by making one of two men engaged in the same business under precisely similar circumstances in the same town or building, a criminal, and imposing no penalty whatever upon the other for the same act. The only difference being that one works for a co-partnership and the other for a corporation." *State vs. Haun*, 47 L. R. A. 369.

Construing an act to secure to laborers and others the payment of their wages, applied only to corporations and trusts employing ten or more persons.

The construction held by the lower court means simply that the plaintiffs in error herein cannot pursue the wrong-doer simply because by chance the deceased husband and father at the time of the accident was working in an extra-hazardous vocation. Had he not been at work, but had stepped beyond the car or stood there talking with someone with whom and where he had a right, and not being in the employ of some extra-hazordous industry, there would be no question as to plaintiffs' right of action. Then suppose again that Mr. Meese had been at work for a grocer who is not within the Act and was employed in taking out of the car barrels of syrup instead of barrels of beer and was injured through similar negligence, of

course there would be no contention about his wife and children having a right to sue; and so you can go on with many cases of similar conditions, eliminating the point of employment, and they all would have their right of action. There is no particular class who work at loading and unloading cars and there is no law that attempts to classify such work, except as it is construed into the Act.

If the plaintiffs would have had a right to pursue the Northern Pacific for their wrongful act had Mr. Meese not been at work, then does not the law or the construction of the law deny the plaintiffs their equal protection? If, at the time of the accident and injury to Mr. Meese, his neighbor, Mr. Jones, had been at the same place, he being there rightfully, but not employed, and injured through the same negligence of defendant, the rule of the lower court would permit Mr. Jones to pursue his right of recovery against the railway company and deny Mr. Meese his right. Can a plainer case of the invasion of constitutional rights be made out? This question is thoroughly gone into in the case of *Cotting vs. Goddard*, 22 Supr. Crt. Rep. 30, construing a Statute of Kansas where an attempt was made to impose certain limits on charges of certain corporations. So, in this case, the decision below places a limit upon the rights of the plaintiffs under certain conditions which are not placed upon others under similar conditions. The fact of the

employment is only an incident, it is not a condition, for Meese, as well as many others, could have been in similar conditions loading cars for himself, assisting a neighbor, or passing the car on a public crossing, and under those conditions injured or killed, which would have fixed a liability beyond question. See also *Gulf Ry. vs. Ellis*, 17 Supr. Crt. Rep. 255. In that case the Supreme Court held invalid the Texas Statute, that railroad companies, failing to pay claims less than $50.00 for labor, etc., within 30 days shall be liable for an attorney's fee. As said in that case:

> "The State may not say that all white men shall be subject to the payment of the attorney's fees of those successful suing them and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which are not furnished proper basis for classification. We must always rest upon some difference which bears a reasonable and just relation to the Act in respect to which the classification is proposed and can never be made arbitrarily."

So in this case the State cannot say that the man, because he is in the employ of an industry, shall be denied his right of action against the third person, but if he is injured while not in his employ, can have his right of action. It cannot say that

because he was in the employ of a certain concern he cannot have the right of action for a wrong done him by a third party, while if he had been in the employ of some other concern and injured under similar circumstances, he would have a right of action. These are distinctions which do not furnish any proper basis for the attempted classification as interpolated by the lower court into the Workmen's Compensation Act. This classification is arbitrary. This is not a classification in fact, because there is no class to which the rule applies. The lower court seem to lay a great deal of stress upon the proposition that liability for wrongful death is a matter of Statute and that the Compensation Act took away that liability, but that is only true when applied to the employer. Even though there was no liability for the death under common law, there was a liability for the doctor bill, hospital fees and burial services when the death is not instantaneous.

Dean vs. Ry., 44 Wash. 564·
Philby vs. Ry., 46 Wash. 173.

It seems to us that the railroad company, defendant in error, cannot be relieved of the liabilities under the law as existing at the time of the passage of the Compensation Act, without some positive declaration in the law, and it is our contention that, even with a declaration eliminating all liability for wrongful acts, including that of third persons,

would be unconstitutional under the circumstances and conditions of this case. We respectfully submit that the lower court should be reversed and the plaintiffs given their right to proceed.

Respectfully submitted,

GOVNOR TEATS,
LEO TEATS,
RALPH TEATS,
Attorneys for Plaintiffs in Error.

No. 2287

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MARY A. MEESE, MAY MEESE, EDITH MEESE, ANNA MEESE, ALFRED MEESE, a minor; CATHERINE MEESE, a minor; LIZZIE MEESE, a minor; WILLIE MEESE, a minor; BENNIE MEESE, a minor, by their guardian ad litem, MARY A. MEESE,
Plaintiffs in Error,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a corporation,
Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

BRIEF OF DEFENDANT IN ERROR

STATEMENT.

Jurisdiction was acquired in this case on the ground of diverse citizenship, the action being brought by the widow and surviving children of

Benjamin Meese, to recover $25,715 damages as the result of his alleged wrongful death while working at the plant of the Seattle Brewing & Malting Company, within the city of Seattle; and the cause of action, if any is stated, must be based upon the statute laws of the State of Washington.

The complaint alleges that the plaintiffs' decedent was killed while engaged in his employment at his place of work, for the Seattle Brewing & Malting Company, as a result of the switching, by the Northern Pacific Railway Company, of cars upon a track used in connection with the business transacted by that company, the complaint showing that both the representatives of the Railway Company doing such switching, and the deceased himself were working towards the accomplishment of the business ends or necessities of the Brewing Company; that the switching crew in performing its work at and for the brewery, failed to notify the deceased that it would disturb a car connected with one of the brewery buildings by a loading chute, and as a result thereof, when the car was disturbed, the loading chute which extended into the building, came in contact with a pile of beer barrels, causing them to be thrown down and upon the plaintiff, inflicting injuries which caused his death.

Under the foregoing statement of facts a de-

murrer was filed upon the ground among others that all jurisdiction of the courts by reason of an accident such as that referred to in the complaint had been withdrawn, and certain relief accorded to the plaintiffs under what is known as the Workman's Compensation Act of the State of Washington, found in *Chapter 74 of the Session Laws of the State of Washington for 1911*, being an act relating to the compensation of injured workmen.

This demurrer presented for the consideration of the district court purely a question of statutory construction, which up to that time had not been passed upon by any appellate court, although a construction such as that contended for by the defendant in error had been sustained by the Superior Court of the State of Washington, for King County, and the question was then and is now pending in the Supreme Court of the State of Washington.

The gist of the complaint and the statutory provisions governing the rights given to injured workmen, under the compensation act, are so concisely set forth in the opinion of Judge Cushman, that we believe that the issues will be more clearly set forth, and the statutory provisions relating thereto more clearly brought out by quoting Judge Cushman's opinion:

"CUSHMAN, District Judge.

"This suit was brought to recover for the death of the husband and father of the plaintiffs, alleged to have been caused by the wrongful act of the defendant. Defendant demurs to the complaint upon several grounds, the only one argued being,

> " 'That there is no authority in law under which the plaintiffs' action can be maintained as against this answering defendant, it appearing from the complaint that Benjamin Meese, on account of whose wrongful death this action was brought, sustained the injuries of which complaint is made, at the place of work and plant of his employer, and that plaintiffs' claim comes within the terms of Chapter 74 of the Session Laws of the State of Washington for 1911, being an act relating to compensation of injured workmen.'

"The complaint alleges:

> " 'On the 12th day of April, 1913, and for a long time prior thereto, Benjamin Meese, deceased, was in the employ of the Seattle Brewing & Malting Company, in its plant located at Georgetown in the city limits of the City of Seattle, King County, Washington; and as part of his duty under his employment with the said Brewing Company, was to assist in loading beer upon the cars and also to place Government stamps upon the barrels, half barrels, quarter barrels when filled with beer and before the same were loaded into the railroad cars spotted at the proper place at said brewing plant for said loading. That at the plant, the said defendant had a railroad track running alongside

of the wire house and buildings containing the finished products to be shipped by said Brewing Company, which said siding was connected with defendant company's switches, siding and main tracks; and the said defendant company furnished the said Brewing Company with cars on said track to be loaded with products of said plant to be carried by said defendant company to their different points of destination. That after the said cars are placed upon said siding of said defendant company, the cars were spotted and moved by the Brewing Company to different places necessary for the loading on said siding, with appliances furnished and operated by the said Brewing Company; and when the said cars were so placed upon the said siding and spotted at the proper places for loading the cars, said Brewing Company used skids and other appliances extending from the car into the warehouse of the Brewing Company, for the purpose of rolling the kegs, barrels, quarter barrels or half barrels of the finished product of the Brewing Company from the plant into the car; and the said Brewing Company employed a crew of men called loaders for the purpose of loading said car with their said finished product and also with ice sometimes necessary in the shipment of the said finished product and at the same time of loading the said car, the said Brewing Company employed workmen to place the necessary Government stamps upon each of the receptacles of the said finished product, which was usually done while said receptacles were moving along the said skids; and the workmen who performed said work usually stood upon the floor or platform beneath the skids and which platform ran alongside of the building and plant of the Brewing Company and into the opening in the building

or plant where the finished product was taken from the store house or plant. That while loading and filling the said car, the movement of the said car, especially without notice to the loading crew and the employe who placed the Government stamps upon the receptacles, was dangerous to the workmen of the Brewing Company, as the movement of the said car would cause the skids, and receptacles of the finished product to fall upon the employes of the brewing plant and injure them.

" 'That at the time of the accident herein complained of, the deceased husband and father was placing Government stamps upon the receptacles, half barrels of the finished products of the Brewing Company, in his regular course of employment, with the Brewing Company and located to the south of the skids and half barrels as they moved from the plant of the Brewing Company into the car.

" 'That while the said deceased, Benjamin Meese, was so employed, placing the Government stamps upon the half barrels and filling and loading a car upon said siding, on the 12th day of April, 1913, at about the hour of 6:10 o'clock of the evening of said day, the said defendant company by and through its switchman, locomotive engineer and employes, carelessly and negligently without warning to the deceased, Benjamin Meese, and without warning to any of the loading crew, then in the employ of the said Brewing Company, loading the car upon the said siding, knowing that said men were at that time loading the car, caused a number of cars to come down the said siding alongside of the plant of the said Brewing Company with tremendous force and momentum, striking the car then being loaded, with tre-

mendous force and momentum, knocking the car along the track, causing the skid then being used by loading crew to load the said car to fly backwards and against the deceased, causing large number of half barrels loaded with the finished product of the Brewing Company upon the said skids to fall upon the deceased, maiming and injuring him so that from said injuries so received through the carelessness and negligence of the defendant company, the said Benjamin Meese, deceased, died on the morning of the 17th day of April, 1913, leaving his widow and children, parties plaintiff herein."

"The Workmen's Compensation Law (Washington Session Laws 1911, p. 345), provides:

"'* * * * The State of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workmen, injured in extra hazardous work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this act; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this act provided. (Sec. 1, pp. 345 and 346.)
* * *

"'Workman means every person in this state, who, after September 30, 1911, is engaged in the employment of an employer carrying on or conducting any of the industries scheduled or classified in section 4, whether by way of

manual labor or otherwise, and whether upon the premises or at the plant or, he being in the course of his employment, away from the plant of his employer: *Provided, However,* That if the injury to a workman occurring away from the plant of his employer is due to the negligence or wrong of another not in the same employ, the injured workman, or if death result from the injury, his widow, children, or dependants, as the case may be, shall elect whether to take under this act or seek a remedy against such other, such election to be in advance of any suit under this section; and if he take under this act, the cause of action against such other shall be assigned to the state for the benefit of the accident fund; if the other choice is made, the accident fund shall contribute only the deficiency, if any, between the amount of recovery against such third person actually collected, and the compensation provided or estimated by this act for such case. Any such cause of action assigned to the state may be prosecuted, or compromised by the department, in its discretion. Any compromise by the workman of any such suit, which would leave a deficiency to be made good out of the accident fund, may be made only with the written approval of the department. (Sec. 3, pp. 347 and 348.) * * *

"'Each workman who shall be injured, whether upon the premises or at the plant or, he being in the course of his employment, away from the plant of his employer, or his family or dependents in case of death of the workman, shall receive out of the accident fund compensation in accordance with the following schedule, and, except as in this act otherwise provided, such payment shall be in lieu of any and all rights of action whatsoever against any person whomsoever." (Sec. 5, p. 356.)

"No question is made but that the employment of the deceased was of an extra hazardous character and within those employments provided for in the act. The question presented is purely one of statutory construction.

"Upon the argument much was said concerning the constitutionality of a legislative act compelling contribution from one person, or employer, to be used in paying for the negligence of another. This phase of the act is not now before the court. That is a defense only to be made by those obliged to contribute to, or those charged with the duty of administering the funds contributed. The question of legislative power may, in this case, only be considered as, possibly, one of the guides to be resorted to in determining the legislative intent manifested by the law as written.

"There is no right of action at common law to recover for death occasioned by the wrongful act of another.

13 *Cyc.* 310.

It is a right solely given by statute. A right such as this which the legislature gives, it may, of course, take away. The sole question, therefore, is: What was the legislative intent concerning this matter?

Was it to end all suits at law for the injury or death of employees while engaged in certain occupations, no matter by whom injured or killed? Or, was it only to end such controversies between employer and employee?

"Parts of the act, taken alone, would justify either conclusion. The title provides:

> "'An Act relating to the compensation of injured workmen in our industries.'

This shows a broad purpose—broad enough to include all injuries caused by any one to such "workman in our industries." Section 1 announces:

> "'The common law system governing the remedy of workmen against employers for injuries received in hazardous work is inconsistent with modern industrial conditions.'

"This shows a narrower view; but, as shown by the parts of the act quoted above, it does not stand alone. Section III of the act, above quoted, provides that, when the deceased workman is killed 'away from the plant of his employer,' through the negligence of another 'not in the same employ,' his wife or children may elect whether to take, under the act, the industrial insurance therein provided for, or seek to recover from such other—that is, recover in an ordinary law action for such other's negligence.

"In this case, the complaint shows that the deceased was—giving the ordinary meaning to the words—killed, not 'away from,' but at the plant of his employer. Sections III and V, in classifying the injuries by the place where they occur, both contain the expression, 'whether upon the premises or at the plant or, he being in the course of his employment, away from the plant of his employer.' 'At the plant' may include less or more than 'on the premises,' depending on the relative extent of the two; but these two expressions show an intention not to limit the application of the law to real property boundaries.

"The proviso, expressly preserving the right of action at law for the death of an employee, resulting from an injury 'occurring away from the plant of the employer' clearly shows an intent to except from that provision of the act, abolishing all private controversies and all rights of civil action, what, but for such provision, would have been abolished, and, as the right of civil action is alone preserved when the injury occurs 'away from the plant of the employer,' then it is not preserved, but is abolished when it occurs at the plant of the employer.

"This intent is further manifested by Section

V of the act providing for the payment of industrial insurance from the fund created by the act, which 'shall be in lieu of any and all rights of action whatsoever against any person whomsoever,' 'except as in this act otherwise provided.'

"The only relevant exception is, without doubt, the one referred to in the provision of the act providing

> " 'That if the injury to a workman occurring away from the plant of his employer is due to the negligence or wrong of another not in the same employ, the injured workman, or if death result from the injury, his widow, children, or dependents, as the case may be, shall elect whether to take under this act or seek a remedy against such other, such election to be in advance of any suit under this section; and if he take under this act, the cause of action against such other shall be assigned to the state for the benefit of the accident fund; if the other choice is made, the accident fund shall contribute only the deficiency, if any, between the amount of recovery against such third person actually collected, and the compensation provided or estimated by this act for such case.' (p. 348.)

"Courts have often had occasion to point out that the intent may frequently more satisfactorily be shown by the nature of an exception than in any other way. This seems to be such a case.

"Demurrer sustained."

ARGUMENT.

In the brief filed by the plaintiffs in error it is urged that the opinion of Judge Cushman is unsound for the reason, *first,* that the workman's compensation act itself does not abrogate the rights of workmen as against third parties; and, *second,* that if it does, such act comes within the inhibition of the fourteenth amendment of the constitution of the United States.

While there is some suggestion to the contrary in the brief of the plaintiffs in error, it cannot be seriously contended but that the only right of action for the wrongful death of another must be based upon statute law, there being no such right of action given at common law.

Michigan C. R. Co. vs. Vreeland, 227 U. S. 59; 33 Sup. Ct. Rep. 192;
St. Louis, San Francisco & Texas Ry. Co. vs. Seale, decided May 26th, 1913, *Advance Sheets of the Supreme Court Reporter,* July 1st, 1913; 33 Sup. Ct. Rep. 651.
13 *Cyc.* 310.

The question then resolves itself into one of statutory construction, and without considering the theory of the learned attorney for the plaintiffs in error, or the recital of some of the abuses which might have been in the minds of some of the leg-

islators of the State of Washington at the time of the passage of this act, many of which are pointed out by the Supreme Court of Washington in the case of *State ex rel Davis vs. Clausen,* 65 Wash. 156; 117 Pac. 1101, a reading of the act will show that its purpose was to afford *sure and certain relief to workmen, in case of injury, or their dependents, in case of death,* regardless of the question of fault or parties responsible and to the exclusion of every other remedy, the first section of the act containing the following declaration:

> "The State of Washington * * * declares that *all phases of the premises are withdrawn from private controversy, and sure and certain relief for workmen injured* in extra hazardous work *and their families* and dependents is hereby provided regardless of questions of fault and to the *exclusion of every other remedy, proceeding or compensation* except as otherwise provided in this act, and to that end *all civil actions* and civil causes of action for such personal injuries *and all jurisdiction of the courts* of the State over such causes *are hereby abolished except as in this act provided.*"

Further by Section 5 of the same act, the Legislature provided as follows:

> "*Each workman* who shall be *injured, whether upon the premises or at the place, or he being in the course of his employment away from the plant* of his employer; *or his family* or dependents, *in case of death* of the workman

shall receive out of the accident fund *compensation* in accordance with the following schedule, and except as in this act otherwise provided, *which payment shall be in lieu of any and all rights of action whatsoever against any person whomsoever.*"

It cannot be questioned but that the purpose of the legislature was to accomplish that which is by the plain words of the act set forth, and that is to provide certain relief to every employe engaged in hazardous employment, irrespective of the cause of the injury, and irrespective of the place of injury. The only test is was he engaged in the course of his employment, and was that employment a hazardous employment as defined by the act. No question is made in this case that the employment of the plaintiffs' decedent was not a hazardous employment within the terms of the act, such employment being designated as Class 37 in Section 4 of the act.

It will be noted that both *Section 1* and *Section 5* provide that the relief afforded by the act shall be exclusive and that *all rights of action against whomsoever* is taken away, except as saved by the act, and the only saving clause found in the act is in the latter part of *Section 2,* under which an employe is given a right of action against a third person for injuries sustained by reason of his or its

negligence *away from the plant or place of work* of his employer.

It is not argued by the plaintiffs in error that the plaintiffs are not entitled under this act to take the compensation as therein provided. The act itself provides that the workman or his dependents are entitled to take compensation regardless of the question of fault, and that such compensation shall be in lieu of any and all right of action whatsoever against any person whomsoever. Having the right to take compensation, there is only one exception under which they are accorded an alternative remedy, and that is in case the injury takes place away from the plant or place of work of the employer. No question is raised in this case, but that the accident occurred at the plant and place of work of the plaintiffs' decedent, and it would seem that a construction of this act as contended for by plaintiffs in error must be based upon the theory that they are not covered thereby, which under the facts in this case would deprive the plaintiffs in error of its benefits and would run contrary to the plain intent of the legislature, to afford certain and definite relief in all cases of injury within the industries of our state.

It is true that in this particular case it may be

a larger return would be brought in by the jury, and that defendant in error being financially responsible would be required to respond. However, there are always certain defenses. The question of negligence would be one for the jury, as well as the deceased's contributory negligence; and on the other hand, the same character of an accident could be brought about by an irresponsible teamster or drayman, and under the act there can certainly be no contention that for an injury occurring *at the plant* of an employer *his personal representatives may elect* to take under the act or sue some third party, the act is plain that the only circumstances under which such right is reserved is when the injury takes place away from the employer's place of business. We therefore submit that under the plain terms of the act, it was the intention of the legislature to cover a case of this character in which, while the employe was injured as the result of the negligence of the third party, both said third party and himself were engaged in the operation of the employer's business and at his plant and place of work.

II.

Both the Supreme Court of the State of Washington, and the District Court for the Western District of Washington, have held that the act in ques-

tion does not violate either the state or federal constitution.

State ex rel Davis vs. Clausen, 65 Wash. 156; 117 Pac. 1101.
Stoll vs. Pacific Coast S. S. Co., 205 Federal 169.

As shown by the preamble of the act, by its passage the state merely exercised its police power, and if it is found that the act has a reasonable relation to the protection of the public welfare of the state, it will not be set aside as violating the fourteenth amendment of the constitution of the United States, although it may incidentally deprive some person of his property without fault, or require one person indirectly to pay the obligation of another.

In passing upon the act Mr. Justice Fullerton, in speaking for the Supreme Court of the State of Washington, in the case of *State ex rel Davis-Smith Co. vs. Clausen, supra.* said:

"If, therefore, the act in controversy has a reasonable relation to the protection of the public health, morals, safety or welfare, it is not to be set aside because it may incidentally deprive some person of his property without fault or take the property of one person to pay the obligations of another. To be fatally defective in these respects, the regulation must be so utterly unreasonable and so extravagant in nature and purpose as to capriciously interfere with and destroy private rights.

"That the statute here in question has the attribute of reasonableness, rather than that of capriciousness, seems incontrovertible. The evil it seeks to remedy is one that calls loudly for action. Accidents to workmen engaged in the industries enumerated in it are all but inevitable. It seems that no matter how carefully laws for the prevention of accident in such industries may be framed, or how rigidly they may be enforced, there is an element of human equation that enters into the problem which cannot be eliminated and which invariably causes personal injuries and consequent financial losses to workmen engaged therein. * * * The common law does not purport to afford a remedy for the condition here found to exist. It affords relief to an injured workman in only a limited number of cases; cases where the injury is the result of fault on the part of the employer and there is want of fault on the part of the workman. For the greater number of injuries traceable to the dangers incident to industry, no remedy at all is afforded. The act, therefore, having in its support these economic and moral considerations, is not unconstitutional for the reasons suggested upon this branch of the argument."

Counsel for the plaintiffs in error state in the opening part of their brief that they do not want to be understood as questioning the constitutionality of this act and something is said as to the senior member of the counsel responsible for the brief, having been connected with the preliminary work of submitting a draft of the law for consideration by the legislature, and it seems to us that the position later taken under the second section of the brief,

as well as the argument, is inconsistent, for under his argument, the act could equally well be declared to be unconstitutional for the reason that it does not apply to workmen in all classes of employment, extra hazardous and otherwise. He refers to an employe in a grocery, such an employe he understands not to be under the act; and he could equally say that the plaintiffs in error, if Meese had been killed as a result of negligence on the part of the brewery, were deprived of the equal protection of the law because they could not sue the brewing company direct, while the employe of the grocery company was given that right as against his employer.

The statute being but an exercise by the state of its police power, under the authorities cited and discussed in the opinions of the Supreme Court of the State of Washington and of Judge Cushman, we submit that there is no such discrimination as brings this phase of the act within the scope of the authorities referred to in his brief, all of which were before both the Supreme Court and the District Court in the two cases referred to, and without encumbering this brief with a citation of a long list of authorities, we are content to rest upon the interpretation and construction so given to this act, and upon the authorities and decisions quoted in such cases. We

quote, however, from Judge Fullerton's opinion in the case of *State ex rel Davis-Smith Co. vs. Clausen, supra,* as follows:

"It is said that the act violates the provisions relating to class legislation because it diverts the contributions exacted from the numerous industries to the relief of a particular class of injured and disabled workmen, instead of applying it to the relief of injured workmen generally or applying it to the use of the state at large. * * * The right of the state to regulate any form of industry arises from the fact that its pursuit affects injuriously the health, safety, morals, or welfare of the persons engaged in it, or is inimical in some form to some portion of the individuals of the community. It is not necessary that it always affect injuriously the public at large."

And in the earlier part of the opinion:

"It is well settled that neither the clause of the state constitution prohibiting class legislation, nor the clause of the fourteenth amendment to the constitution of the United States relating to the equal protection of the laws, takes from the state the power to classify in the adoption of police regulations. The limitations imposed admit of a wide discretion in this respect, and avoid only what is done without any reasonable basis; that is, such regulations as are in their nature arbitrary. The learned counsel for the auditor recognize this distinction, and consequently do not attack the act because it is confined to extra hazardous occupations as its field of regulation, but complain because its benefits are not confined to workmen injured while engaged in such occupations."

III.

The plaintiffs in error further urge as a third ground for reversing the judgment entered by the district court that in any event they are entitled to recover medical bills and funeral expenses. A complete answer to this contention is that the complaint is not drawn upon any such theory. The action is based upon the theory that the defendant is liable for the wrongful death of the decedent, and damages upon that theory are sought to be recovered. No such position was taken before the learned district judge, and this theory as now presented is a mere afterthought.

Another complete and conclusive answer to this position is that assuming that the defendant may be liable for doctor bills and funeral expenses, it is not claimed that the recovery in any event would exceed the sum of $800.00, and that being true the district court would not have jurisdiction and the demurrer even if the case was considered as being brought upon that theory was properly sustained.

In *North American Transportation & Trading Co. vs. Morrison,* 178 U. S. 262; 44 L. Ed. 1061, the Supreme Court in considering a similar contention says:

"But where the plaintiff asserts as his cause of action a claim which he cannot be legally permitted to sustain by evidence, a mere *ad dammum clause* will not confer jurisdiction on the circuit court, but the court on motion or demurrer, or of its own motion, may dismiss the suit. And such, we think, was the present case."

In *Horst et al vs. Merkley et al,* 59 Federal 502, we quote from the *syllabus,* opinion rendered by Justice Gilbert:

"When it appears from the plaintiff's own testimony that one of the causes of action pleaded never had any existence, and the remaining matters are not of sufficient value to support the jurisdiction, the case must be dismissed."

In *Maxwell vs. Atchison etc. Ry. Co.,* 34 Federal, 290, from the Circuit Court for the Eastern District of Michigan, the court said:

"It seems to me that wherever it appears clear from the plaintiff's own statement, or the testimony of his witnesses, that a verdict of $2,000.00 would be so grossly excessive as to require the court in the exercise of its judicial discretion to set it aside, and direct a new trial, it is equally its duty to dismiss the case for want of jurisdiction."

Authorities without number upon this same question could be cited, but the authorities referred to are sufficient to dispose of this last contention made by the plaintiffs in error.

We respectfully submit that the learned district

judge correctly construed the compensation act of the State of Washington, that under the terms of the act plaintiffs in error are accorded a sure and definite relief, and, under the act as a whole, actions of this character have been withdrawn from the jurisdiction of the courts; and that the learned district judge was right in sustaining the defendant's demurrer and entering a judgment of dismissal.

Respectfully submitted,

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